

United States
Court of Appeals

FOR THE NINTH CIRCUIT

ELSIE SUMMERS,

Plaintiff - Appellant,

vs.

WALLACE HOSPITAL, PAUL L. ELLIS,
HUBERT E. BONEBRAKE and LEWIS B.
HUNTER, a co-partnership, and
HUBERT E. BONEBRAKE, M. D.,
Individually,

Defendants - Respondents.

APPELLEES' BRIEF

Appeal from the United States District Court of Idaho
Northern Division

E. L. MILLER

A Member of the Firm of
HAWKINS & MILLER
Coeur d'Alene, Idaho
Attorneys for Appellees

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STATEMENT OF PLEADINGS AND FACTS
DISCLOSING JURISDICTION

The appellees accept the appellant's statement
of jurisdiction.

STATEMENT OF THE CASE

On March 26, 1951, the plaintiff had performed

upon her by the defendants, a total hysterectomy. (Tr. pg. 30, Pl. Ex. D-2, D-2A, D-2-I, Dep. of Def. Bonebrake, pg. 47 Tr.)

On November 29, 1954, plaintiff consulted defendants for the last time. (Tr.pg. 123, 157, 158, 161. Pl. Ex. D-23, Dep. Def. Bonebrake, pg. 21.)

On August 5, 1955, Dr. Cordwell, then the plaintiff's doctor, discovered the presence of a needle in the abdominal wall.

Plaintiff filed her complaint on July 29, 1957.

Thereafter defendants filed motion to dismiss (Tr. pg. 8) which was denied without prejudice and thereafter filed their answer together with a motion to restrict evidence, which was likewise denied without prejudice. (Tr. pg. 15).

On November 10, 1958, pursuant to the Court's order, all depositions were duly published.

On November 12, 1958, the Court directed entry of a verdict during course of Plaintiff's case, for the defendant, upon the grounds that the action was barred by the statute of limitations. (Tr. pgs. 15, 16, 17.)

STATEMENT OF POINTS TO BE ARGUED

The entire issue before the court is whether this action brought by the plaintiff may be maintained in view of the provisions of 5-219 Idaho Code, and

the decision of the highest court of the State of Idaho, in TRIMMING vs. HOWARD, 52 Idaho 412, 16 P. 2d 661.

SUMMARY OF ARGUMENT

The appellant proposes upon appeal for determination by this court, the issue as to the commencement of the running of the statute of limitations in a malpractice action. The appellant points out the three rules:

1. The original injury rule.
2. Upon cessation of physician-patient relationship rule.
3. Discovery rule.

The appellant relies upon the discovery rule. (Tr. pg. 165)

The provisions of 5-219 Idaho Code, sub. para. 4, recite as follows:

- “5-219. Actions against Officers, for penalties, on bonds, and for personal injuries. — Within two years: . . .
4. An action to recover damages for an injury to the person, or for the death of one caused by the wrongful act or neglect of another.”

As further grounds upon appeal, appellant raises for consideration of the court the act of the trial court in restricting evidence to that two year period

of time immediately preceding the filing of the complaint.

It is the position of the appellees that under and by virtue of the decisions of the highest court of the State of Idaho, the statute of limitations commenced to run on or at the time of the original injury, being March, 1951, and that the running thereof was tolled for only so long as the appellant continued under the treatment of appellees. Upon cessation of treatment the statute of limitations commenced to run.

ARGUMENT

In March 1951, there was performed upon the plaintiff a hysterectomy operation. From 1951 through 1954, the plaintiff solicited treatment from the defendants.

On November 29, 1954, the plaintiff ceased any further treatment from the defendants.

In August, 1955, the presence of a needle in the plaintiff's abdominal wall was discovered. In February, 1956, the plaintiff requested the defendants, and in particular Dr. Bonebrake, to remove the needle. The plaintiff made no allegation or complaint that there was any negligence in the operation or procedure by which the needle was removed.

It is the position of the appellees that the statute of limitations commenced to run at the time the needle was left within the person of the plaintiff, and was

tolled only for so long as the defendant continued to treat the plaintiff. Upon cessation of treatment of the plaintiff by the defendants, in November, 1954, the statute of limitations commenced to run. The action had to be instituted within two years from that date, or on and before November 29, 1956. The action was not filed nor instituted until July 29, 1957, and was therefore barred by the statute of limitations.

The Supreme Court of the State of Idaho, in an identical case of TRIMMING vs. HOWARD, 52 Idaho 412, 16 P. 2d 661, enunciated the rule as concerns the statute of limitations in a malpractice suit. The Court stated as follows:

“The gist of a malpractice action is negligence, not a breach of contract of employment. The original injury, be it caused by carelessness, negligence, misconduct or whatnot, remains the sole cause of action; and the action is one of tort and not for breach of contract.

“According to his pleadings, appellant’s cause of action arose on July 4, 1926, when the broken needle was left in his back.”

The courts of Idaho have therefore adopted the original injury theory as determining the question of limitation of action insofar as malpractice cases are concerned.

In the Case of MOORE vs. TREMELLING, 100 F. 2d 39 (C. A. 9), this court had occasion to examine the law of Idaho in a malpractice action. The court there held as follows:

“Section 5-219, Idaho Code Annotated 1932, provides that actions to recover damages for personal injury caused by wrongful act or neglect of another must be brought within two years. The accident occurred on May 28, 1931, and appellee first consulted appellant on that day for treatment. The complaint was filed December 5, 1933. The contention of appellant is that there is no evidence that appellee was treated by him after August 20, 1931, and consequently that the cause of action accrued at that time; that even if appellant did advise or treat appellee as claimed by him on January 28, 1932, there is no evidence that appellee was injured by such advice or treatment. There is no merit in his contention. There is evidence that on January 28, 1932, appellant advised appellee to throw away his crutches and put weight on his leg and that appellee was damaged by following this advice.”

The MOORE case proposes that continuing treatment will toll the running of the statute of limitations and the court in that case found that the injury had actually occurred within two years of the filing of the complaint.

In the instant action, six years and four months had elapsed since the original injury. Two years and eight months had elapsed from the cessation of treatment date until the complaint was filed. The only basis upon which the appellant could maintain the action is as stated in the discovery rule which was examined by the Supreme Court of the State of Idaho in the TRIMMING case and rejected.

As stated by the appellant upon her direct ex-

amination, at no time after 1954 was she treated by the appellees.

“Q. Well, now, go back and give to the jury your best memory of the times that you consulted with Doctor Bonebrake during this period of time about the subject you are testifying about?

“A. Do you mean after my operation?

“Q. Now, you have to come from the time you testified that the needle was removed back to the operation. (10) Give us the times that you saw him about it.

“A. Well, in 1954, I was in constant care with him. In '53 I was in constant care with him and in '52 I was in constant care with him, always going back once and twice a month. (Tr. pg. 157)

“Q. Mrs. Summers, in order to fix the definite time, now, between 1956 and between August 5, 1955 back toward '51 when did you last see Doctor Bonebrake about this trouble in your abdomen?

Mr. Miller: Your Honor, I am going to object to that as impeaching his own witness. She has already testified that November, 1954 was when she was treated by Doctor Bonebrake. (15)

The Court: Well, maybe her testimony will be the same. She may answer.

“A. As I said, I was in contact with Doctor Bonebrake through 1954, '53, '52.” (Tr. pg. 161)

RESTRICTION OF EVIDENCE

The appellant assigns as error the action of the trial court in restricting the evidence to the two years immediately preceding filing of complaint.

The action of the trial court was proper. In *TESSIER vs. U. S.*, 156 F. Supp. 32, affirmed 269 F. 2d 305 (CA 1st), the Court had before it a like statute of limitations as Idaho. Metal was left in the patient after an operation. The lower court held that no recovery could be had for any act which extended beyond the two years preceding the filing of the complaint.

In affirming the lower court, the Court of Appeals held:

“It seems clear that the law of that state gave him a right of action as soon as the metal fragments were abandoned in him. There was a legal wrong on June 7, 1947, and suit thereon was not suspended because of any duty imposed on the United States to remove the fragments.”

TESSIER vs. UNITED STATES
269 F. 2d 305 (C.A.1st)

The appellant relies upon the case of *SILVERTOOTH vs. SHALENBERGER*, 174 S. E. 365. That case held that the plaintiff could only recover for acts of negligence, if any, which occurred within the period of limitation as provided by state law from the date of filing of the complaint. The ruling was re-affirmed in *SILVERTOOTH vs. SHALENBERGER*, 196 S. E. 829.

The trial court's ruling was proper and in accordance with the authorities.

REMOVAL OF NEEDLE

The appellant, by her complaint, made no allegation as to any acts of negligence in the procedures by which the needle was removed. (Tr. p. 164) The only act of the appellees therefore within the two years prior to the filing of the complaint was not a negligent act, but one for which there could be no recovery under the pleadings or in fact.

CONCLUSION

The matter before the court is a legal question not a social problem. The statute of limitations may be a cruel rule, but is designed to apply to all alike to prevent the litigation of stale claims.

The highest court of the State of Idaho, upon a case of almost identical nature, has established the law of the State of Idaho. It carefully examined the discovery rule as exists in the State of California, and rejected the same.

Under the doctrine of *ERIE RAILROAD vs. TOMPKINS*, 304 U. S. 64, 82 L. Ed. 1188, it is the duty of Federal Courts to apply the substantive law of the state in matters before it.

It is therefore respectfully submitted that the directed verdict was proper and that the action was

barred by the statute of limitations of the State of Idaho.

Respectfully submitted,

E. L. Miller

A Member of the Firm of
HAWKINS & MILLER
Coeur d'Alene, Idaho
Attorneys for Appellees

Service of the above and foregoing Brief of Appellees is hereby admitted and copy is received thisday of October, 1959.

HAWKINS & MILLER,

By
Attorneys for Appellees